

SIERRA CLUB UNCOMPAHGRE GROUP
CONCERNED CITIZENS RESOURCE ASSOCIATION

IBLA 98-364

Decided June 29, 2000

Appeal from a Record of Decision of the State Director, Colorado, Bureau of Land Management, approving issuance of a water pipeline right-of-way grant. COC-57665.

Motion to dismiss denied; decision affirmed.

1. Environmental Quality: Environmental Statements--
National Environmental Policy Act of 1969:
Environmental Statements

Preparation of an environmental impact statement for a water pipeline right-of-way requires that BLM rigorously and objectively analyze reasonable alternatives to the proposed action which will accomplish the intended purpose, are technically and economically feasible, and will have less environmental impact. A decision to implement the proposed action may be affirmed when the record discloses that other alternatives analyzed were rejected because they are not feasible.

2. Environmental Quality: Environmental Statements--
National Environmental Policy Act of 1969:
Environmental Statements

In preparing an environmental impact statement, BLM is required to consider the indirect impacts which will be caused by the proposed action. When the record discloses that a proposed water pipeline was prompted in part by existing population growth, no error is established by the failure of BLM to consider the impacts of population growth as indirect impacts of the pipeline.

APPEARANCES: Vicki S. Mercer, Chair, Sierra Club Uncompahgre Group, Palisade, Colorado, for appellants; Mark A. Hermundstad, Esq., Grand Junction, Colorado, for the Ute Water Conservancy District; Terri L. Anderson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Sierra Club Uncompahgre Group and Concerned Citizens Resource Association (CCRA) have appealed from a Record of Decision (ROD) (No. FES-98-4) issued by the State Director, Colorado, Bureau of Land Management (BLM), dated May 6, 1998. That decision approved issuance of right-of-way grant COC-57665 to the Ute Water Conservancy District (Ute Water), intervenor in this appeal, for the "Plateau Creek Pipeline Replacement Project" in western Colorado.

Ute Water, a political subdivision of the State of Colorado, is primarily responsible for providing a safe, reliable supply of drinking water to over 60,000 residents in the Grand Valley area of Mesa County, Colorado. (Draft Environmental Impact Statement (EIS) at 1-2; Final EIS at 1-2; Ute Water Response to Petition for Stay at 1.) On December 12, 1994, Ute Water applied for issuance of a right-of-way grant, which would authorize construction, operation, and maintenance of a replacement for an existing water pipeline, to the extent it crosses public lands. Ute Water explained the need as follows:

The Plateau Creek Pipeline is Ute Water's primary raw water conveyance facility. It consists of a 24[-inch] diameter pipeline, approximately 14.5 miles long, constructed in the early 1960's. The Plateau Creek Pipeline conveys high quality mountain water to Ute Water's only treatment plant, by gravity flow. It had a design life of 30 years. This aging pipeline is now more than 33 years old, and is at the end of its useful operational life. In addition, its current capacity level does not meet Ute Water's current peak daily demands, much less its future demands as its customer base grows.

(Ute Water Response to Petition for Stay at 1-2; see Draft EIS at 1-2 to 1-4, 1-13, 3-6; Final EIS at B-133; Replacement of the Plateau Creek Pipeline Project Management Plan (PMP), dated June 9, 1995, at 2-1 to 2-4.)

Ute Water reports, on appeal, that recent experience with the existing pipeline supports the assertion that it is at the end of its useful operational life:

[T]here has been a dramatic increase in failures of the pipeline in recent years, involving weakening, corrosion, and eventual breakage of the pipe and joints. In the last nine months, there have been four major breaks in one area near the end of the pipeline, which have cost over \$100,000 to repair.

(Response to Petition for Stay at 4.) With respect to the need for an additional water supply, Ute Water reports:

Ute Water's demand already exceeds the capacity of the existing pipeline during much of the period from May through September of each year. * * * [S]ince 1980, the number of residential

taps served by Ute Water has grown at an average annual rate of 3.2 [percent]. Ute Water anticipates a similar (if not higher) growth rate in the immediate future. Such growth will put additional demands on * * * Ute Water's system[.]

(Response to Petition for Stay at 4-5.) Replacement of the existing pipeline is intended to increase its size from 24 to 48 inches in diameter, thus allowing it to carry sufficient additional water to meet the anticipated year 2045 peak-day water demand in Ute Water's service area in the Grand Valley, and to realign the pipeline so as to minimize its current environmental impacts. (Ute Water Response to Petition for Stay at 2; Draft EIS at 1-14; Final EIS at B-133, B-135, B-139.)

The replacement pipeline would run west along Plateau Creek, from Ute Water's primary water storage facilities at the Jerry Creek Reservoirs to the vicinity of the confluence with the Colorado River, and then turn southwest, terminating at the Ute Water Treatment Plant northeast of Palisade, Colorado. The proposed right-of-way grant would cover noncontiguous segments of public lands totaling approximately 3 miles across which the pipeline would run.

Statutory authority for Ute Water's proposed right-of-way is found in Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. ' ' 1761-1771 (1994), and its implementing regulations (43 C.F.R. Part 2800).

In order to assess the environmental impacts of granting a replacement pipeline right-of-way and alternatives thereto, BLM prepared an EIS as required for a major Federal action which might have a significant impact on the human environment. National Environmental Policy Act of 1969 (NEPA), section 102(2)(C), 42 U.S.C. ' 4332(2)(C) (1994). A Draft EIS was issued in June 1997, along with supporting Technical Memoranda, and distributed to the public, for a period of 60 days, for comment. 1/ See 62 Fed. Reg. 35520 (July 1, 1997). Thereafter, BLM issued a Final EIS in February 1998. See 63 Fed. Reg. 10237 (Mar. 2, 1998).

In its EIS, BLM considered the action proposed by Ute Water (Alternative A), which was BLM's preferred alternative, and three other alternatives including the no action alternative. The other two alternatives

1/ The Technical Memoranda are found in the record in three looseleaf-bound notebooks. Volume I contains seven technical memoranda designated "Biological Resources" (March 1997), "Socioeconomic" (Apr. 28, 1997), "Class III Cultural and Paleontological Resources Inventory Report" (Mar. 20, 1996), "Pre-Design Geotechnical Investigation" (June 19, 1996), "Ground Water Resources" (May 5, 1997), "Ute Water Service Area Domestic Water Demand Projections" (Oct. 1995), and "Fish Habitat Investigation Lower Plateau Creek" (July 1995). Volume II contains the June 10, 1997, "Alternatives Technical Memorandum" and Volume III contains the June 4, 1997, "Water Resources Study Technical Memorandum."

would involve constructing a 48-inch diameter replacement pipeline mostly within the Highway 65 right-of-way (Alternative B) and constructing a 39-inch diameter replacement pipeline in the proposed alignment together with building a booster pump station in the future to meet year 2045 peak-day water demand (Alternative C). Under the no action alternative, Ute Water would be permitted, by its existing right-of-way grant (C-81284), to replace the current 24-inch-diameter pipeline within its present alignment.

Twelve other alternatives were also considered, but were not subjected to detailed analysis after preliminary screening disclosed that they either did not meet the project needs (provide the required quantity of water), were not logistically feasible, or were prohibitively expensive. (Draft EIS, Appendix D at D-4 through D-6.)

Because of the presence in the project area of Federally-listed threatened and endangered animal and plant species, BLM prepared a Biological Assessment dated July 1, 1996, and formally consulted with the Fish and Wildlife Service (FWS), U.S. Department of the Interior, pursuant to section 7 of the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. ' 1536 (1994). On February 4, 1998, FWS issued a Final Biological Opinion (BO) concluding that the proposed action was unlikely to adversely affect the southwestern willow flycatcher and certain other threatened or endangered species. (Final EIS, Appendix C at 1.) The BO further found that the project was likely to jeopardize the continued existence and result in the destruction or adverse modification of the critical habitat of four endangered fish species found in the Colorado River: Colorado squawfish (Ptychocheilus lucius), humpback chub (Gila cypha), bonytail chub (Gila elegans), and razorback sucker (Xyrauchen texanus). (Final EIS, Appendix C, at 1-2.) Accordingly, the FWS BO provided reasonable and prudent alternatives, which BLM was required to include in its right-of-way grant, in order to avoid such adverse impact on these species, principally from the depletion of water in Plateau Creek and ultimately the Colorado River, to which the creek is tributary. Id. at 39-49. These measures, which would primarily limit water depletions, in the immediate future, to a 10-year annual average of 3,000 acre-feet, were thus included in the subject grant. (ROD at 1-2 (adopting Attachment 3 to ROD and Final EIS at 12-13, 16).)

In the May 1998 ROD, the BLM State Director selected the preferred alternative, approving issuance of the right-of-way grant to Ute Water, subject to standard design features and mitigation and monitoring measures set forth in the EIS, ROD, and the Grand Junction Resource Area Resource Management Plan, which were designed to avoid or minimize adverse environmental impacts. ^{2/} (ROD at 1-2.) That alternative was selected over the others because it fulfilled the purpose and need of Ute Water's proposal,

^{2/} The ROD did not itself authorize Ute Water to proceed with construction of the replacement pipeline. That requires BLM's issuance of a notice to proceed, in response to submission and approval of Ute Water's plan of development. The plan would set forth the specific alignment of the pipeline across public lands, best management practices which would be employed during construction, and other engineering details.

by providing a reliable supply of high quality drinking water to its customers, thus meeting their current and future demands, by a means other than its out-dated and inadequate existing pipeline. Id. at 3. Further, the State Director noted that the alternative provided mountain water preferred (from a taste and odor standpoint) by Ute Water's customers over river water from the Colorado River. 3/ Id.

By Order dated July 31, 1998, the Board granted a motion by Ute Water to intervene as a party to the present proceeding. That same order denied appellants' petition to stay the effect of the State Director's May 1998 ROD, pending our resolution of the merits of their appeal.

As a threshold matter, we address a motion by BLM, in which Ute Water joins, to dismiss the appeal for failure to file a statement of reasons for appeal (SOR) with the Board within 30 days after filing their notice of appeal with BLM on June 12, 1998, as required by 43 C.F.R. ' 4.412(a). It is true that the SOR was not filed with the Board until July 15, 1998, having been transmitted to us 1 day earlier (thus precluding a waiver of the late filing pursuant to 43 C.F.R. ' 4.401(a)).

We discern no prejudice to BLM or Ute Water, both of whom filed an Answer to the SOR, from the late filing. The late filing of a SOR causes an appeal to be "subject to summary dismissal." 43 C.F.R. ' 4.402 (emphasis added). The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party. Indeed, in the absence of such a showing, dismissal of an appeal might be deemed an abuse of discretion. James C. Mackey, 96 IBLA 356, 359, 94 I.D. 132, 134 (1987); see United States v. Rice, No. CIV. 72-467, PHX WEC (D. Ariz. Feb. 1, 1974), reversing United States v. Rice, 2 IBLA 124 (1971). Therefore, we decline to exercise our discretionary authority, under 43 C.F.R. ' 4.402, to summarily dismiss the appeal on this basis, and thus the motion by BLM is denied.

On appeal, appellants contend that BLM failed to consider an adequate range of alternatives by dismissing from serious consideration those alternatives which do not involve enlargement of the pipeline. (SOR at 4.)

Specifically, appellants assert that BLM erred in not giving more substantial consideration to the alternative of consolidation of the Grand Valley's three water providers (including intervenor). Id. at 5. Further, appellants argue that BLM failed to give reasonable consideration to the

3/ Ute Water states that the mountain water carried by its pipeline originates in the headwaters of Plateau Creek and its tributaries, which flow off a large, flat-top mountain ("Grand Mesa"), immediately east of the Grand Valley, and that the river water is obtained from the Colorado River, which flows east-west through the valley, having originated in the Rocky Mountains well east of the valley. (Answer at 2-3.) It asserts that the quality of the river water is "very poor" when compared to the mountain water, because it has been "heavily used" for agricultural, municipal, and other purposes before it reaches the valley. Id. at 3.

alternative of constructing a nanofiltration plant as a source of water supply. Id. at 5-12. Appellants present their own analysis, asserting that the nanofiltration option was improperly rejected based on the higher cost associated with a reverse osmosis system which appellants argue is more expensive. Id. at 6-7.

Additionally, appellants contend that the EIS failed to consider cumulative and indirect impacts. Appellants contend that BLM erred in finding that growth-related issues were outside the scope of the action because the project is not a causative factor for such impacts. Id. at 13.

Appellants assert that the U.S. Department of Agriculture erred in limiting its assessment of the impact of the project to farmlands by only assessing the impact to the 96 acres of public lands within the project, arguing that the dramatic increase in domestic water supply provided by the project could spawn urban sprawl which could destroy up to 100 square miles of farmlands. Id. at 16.

Appellants further contend that the EIS failed to adequately analyze the costs of the project to ratepayers and taxpayers. Id. at 17. Appellants also challenge the population growth projections used to justify the size and scope of the project. Id. at 18. Further, appellants argue that BLM failed to provide adequate protection to the habitat of the endangered southwestern willow flycatcher along Plateau Creek. Id. at 19.

Finally, appellants assert that BLM erred in not addressing the de-watering of nonjurisdictional wetlands that may be supported by agricultural return flows. Id.

In an Answer to the SOR, BLM asserts that the range of alternatives to the proposed pipeline project considered in the environmental review process was not limited to use of an enlarged pipeline. (BLM Answer at 4-5.) With respect to the consolidation alternative involving unification of the three major domestic water suppliers in the Grand Valley, BLM indicates that even with unification the Plateau Creek pipeline would be a key part of any unified system and it is likely that Ute Water could obtain only limited water from other suppliers to meet future needs. Id. at 6. Further, BLM points out that it looked closely at the nanofiltration alternative as disclosed in the record. Id. at 6-7.

Regarding indirect effects of the proposal, BLM disputes the assertion that the proposed action would be a causative factor in population growth generally in the area. Id. at 8-9. Further, BLM asserts that it did consider the impact of costs to ratepayers. Id. at 11. With respect to estimates of future population growth and water demand, BLM notes that the projections are supported by documentation in the record while appellants have failed to present evidence to the contrary. Id. at 11-12. Regarding effect on the endangered southwestern willow flycatcher, BLM notes that it consulted with the FWS pursuant to section 7 of the ESA, 16 U.S.C. ' 1536 (1994), and obtained a BO determining the project "may affect but is not likely to adversely affect the southwestern willow flycatcher." Id. at 12-13. Finally, in response to appellants' assertion of failure to consider de-watering of wetlands, BLM contends that NEPA does not require analysis of entirely speculative future impacts. Id. at 13.

Intervenor Ute Water has also filed an Answer. With respect to the alternative of consolidation of the regional water authorities, Ute Water explains that this is not a viable alternative in that each has developed a source of supply for its customers which it expects to utilize fully over time. (Answer at 6.) Further, it notes that consolidation has been studied by an independent engineering firm which found that the Plateau Creek pipeline would be the key to a unified system and, thus, the pipeline would still need to be enlarged. Id. Regarding the viability of a nanofiltration system alternative, Ute Water notes that the system used by the Clifton Water District and urged by appellants varies in certain critical respects from the facilities operated by Ute Water. Intervenor contends that its treatment plant is located substantially farther from the Colorado River (1.5 miles as opposed to adjacent), the plant has a very limited capacity to treat Colorado River water, large-scale nanofiltration treatment would require substantial pumping expenditures, and the expense of necessary brine disposal would be far greater as a result of the location of the Ute Water treatment plant. Id. at 8-9. Intervenor asserts these factors cause this alternative to be impractical. Id. at 9.

It is well established that the adequacy of an EIS, under section 102(2)(C) of NEPA, must be judged by whether it constituted a "detailed statement," which took a "hard look" at all of the potential significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern. 42 U.S.C. ' 4332(2)(C) (1994); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); see 40 C.F.R. ' 1502.1; Dubois v. U.S. Department of Agriculture, 102 F.3d 1273, 1285-86 (1st Cir. 1996), cert. denied, 117 S.Ct. 2510 (1997); Silva v. Lynn, 482 F.2d 1282, 1284-85 (1st Cir. 1973); Colorado Environmental Coalition, 142 IBLA 49, 52 (1997); The Sierra Club, 104 IBLA 76, 83 (1988).

In general, an EIS must fulfill the primary mission of section 102(2)(C) of NEPA, which is to ensure that BLM, in exercising the substantive discretion afforded it to approve issuance of a right-of-way grant pursuant to Title V of FLPMA, is fully informed regarding the environmental consequences of such action. 40 C.F.R. ' 1500.1(b) and (c); Dubois v. U.S. Department of Agriculture, 102 F.3d at 1285-86; Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987). In deciding whether an EIS promotes informed decisionmaking, it is well settled that a "rule of reason" will be employed. As the court stated in County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978):

[A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

The critical question is whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action and alternatives thereto. State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)); see Scientists' Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

[1] Relevant Council on Environmental Quality regulations provide that Federal agencies shall, to the fullest extent possible, "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. ' 1500.2(e). Agencies shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. ' 1502.14(a). Such alternatives should include reasonable alternatives to a proposed action which will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser impact. 40 C.F.R. ' 1500.2(e); Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990); City of Aurora v. Hunt, 749 F.2d 1457, 1466-67 (10th Cir. 1984); Defenders of Wildlife, 152 IBLA 1, 9 (2000); Howard B. Keck, Jr., 124 IBLA 44, 53 (1992), aff'd, Keck v. Hastey, Civ. No. S92!1670!WBS!PAN (E.D. Cal. Oct. 4, 1993). A "rule of reason" approach applies to both the range of alternatives and the extent to which each alternative must be addressed. Southern Utah Wilderness Alliance, 152 IBLA 217, 223-24 (2000); see Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972); Allen D. Miller, 132 IBLA 270, 274 (1995).

With respect to the range of alternatives analyzed, the record discloses that BLM considered the alternative of consolidating the three largest domestic water providers in the Grand Valley. (Draft EIS at D-9 to D-10; Final EIS at B-129 to B-130.) Significant factors in rejecting this alternative include the fact that the largest amount of excess high quality water held by other suppliers is about 4,000 acre-feet, a small portion of the projected need of 28,589 acre-feet by 2045. (Draft EIS at D-9; Alternatives Technical Memorandum, dated June 10, 1997, at 6-2 to 6-3.) Further, BLM noted that water from the other two providers would not necessarily be available in the future: "Other providers plan to fully utilize their own supplies over time [in order to meet future growth in their areas]. It is likely that Ute Water could obtain only very limited supplies (if any) from these other entities during a peak demand event." (Final EIS at B-130.) Thus, BLM concluded that "none of these additional water supplies can be guaranteed to meet [Ute Water's] future demands." (Letter to the Environmental Protection Agency (EPA) from Area Manager, dated May 15, 1998, at 2; see Letter to Ute Water from Clifton Water, dated July 18, 1995 ("[Clifton Water] could be putting a demand on Ute [Water's] system [in the future]").) Further, as BLM notes: "[E]ven with unification, the Plateau Creek Pipeline and the Ute Water Treatment Plant would be the cornerstone of any unified system." (Final EIS at B-129 to B-130.) Additionally, BLM noted that replacement of the Plateau Creek pipeline is required regardless of whether consolidation is implemented. (Draft EIS at D-10.)

Thus, it is clear from the record that the consolidation alternative would not accomplish the intended purpose of the proposed action, which is to satisfy the need for a reliable supply of sufficient drinking water, both now and in the future. In light of the record, appellants have not shown that BLM improperly excluded this alternative from detailed analysis. Howard B. Keck, Jr., 124 IBLA at 53-54.

The alternative of satisfying the need for a reliable supply of high quality drinking water, which meets current and future demand, by means of obtaining water from the Colorado River and purifying it, using either a reverse osmosis or nanofiltration system in conjunction with Ute Water's conventional water treatment facility, was also considered by BLM. (Draft EIS at D-3 to D-8; Final EIS at 7-8, B-124 to B-127, B-145.) It rejected this alternative primarily because of the prohibitive cost in both cases, noting that the costs of implementing a reverse osmosis and a nanofiltration system would be similar. ^{4/} (Draft EIS at D-7 to D-8; Final EIS at 4, 7-8, B-124 to B-126; Letter to CCRA from Area Manager, dated May 15, 1998, at 1-2; see Ute Water Answer at 13 ("[T]he * * * components of both RO [reverse osmosis] and nanofiltration [systems] are very similar. So, too, are the capital costs of both systems.").)

Specifically, BLM determined that the \$41.7 million cost of constructing and operating a new Colorado River pump station and related facilities, which would be required in order to generate enough water to meet current and future demand (whether that demand was met by treated river water alone or treated river water together with mountain water provided by a new 24-inch-diameter pipeline), would substantially exceed Ute Water's \$35 million financial capability threshold and the expected \$34.3 million cost of the proposed action, without even considering the cost of the new treatment facility itself. (Draft EIS at 2-3, 2-5 to 2-6,

^{4/} The record also discloses the nanofiltration alternative would not satisfy the water quality standards for total dissolved solids and hardness attained by Ute Water's existing mountain water supply and, thus, would not satisfy its customers' current preference concerning taste and odor. (ROD at 3; Final EIS at 7-8, B-124 to B-125, B-128, B-151 to B-152; Draft EIS at D-7 to D-8; PMP at 2-3; Water Resources Study Technical Memorandum at 6-23, 6-26; Attachment B at 1 ("Colorado River source of supply * * * triggers customer complaints").) Appellants assert, in response, that a study conducted by Clifton Water revealed that its customers do not find its nanofiltration-treated water "objectionable." (SOR at 11.) This, however, does not undermine BLM's conclusion that mountain water is preferred by Ute Water's customers over treated river water.

Appellants have also not challenged BLM's conclusion that the nanofiltration alternative poses a greater threat to Federally-listed endangered fish and their critical habitat in the 15-mile stretch of the Colorado River, which runs west from Palisade to Grand Junction, than the proposed action, given the need to draw more water from the river and its tributaries and to build a new pump station on the river. (Final EIS at 7-8, B-124 to B-126; see Ute Water Answer at 12-13, 15-16.)

D-7 to D-8; Final EIS at 8, B-127, D-1 to D-2; Letter to CCRA from Area Manager, dated May 15, 1998, at 1-2.) As BLM stated:

While membrane treatment [using either a reverse osmosis or a nanofiltration process] can be used to enhance conventional treatment to meet higher water quality objectives, constructing a membrane treatment facility would require additional investment in [an] already cost-prohibitive * * * alternative[] that require[s] a pump station to replace or supplement the delivery of water from the existing Plateau Creek pipeline.

(Final EIS at 8.)

Appellants argue that BLM erred in its assessment of the cost of a nanofiltration system, inflating that cost. ^{5/} (SOR at 6.) They challenge BLM's failure to consider the actual cost of the nanofiltration system already in use in the neighboring Clifton Water District, which, although it operates at less capacity than would the nanofiltration system proposed for Ute Water (2.4 versus 13 MGD), is the "obvious choice for cost comparison," since "[e]nvironmental and economic conditions, such as source water [and] energy[] and building costs, vary from region to region, making comparisons with water treatment facilities in other parts of the country problematic." Id. at 7-9.

Appellants estimate that, since a new Ute Water 13 MGD nanofiltration system would have to have 5.4 times the capacity of the Clifton Water system, the cost to Ute Water to build such a system would be 5.4 times the Clifton Water cost of \$3.4 million, or \$18.36 million. ^{6/} (SOR at 7-8.) They note that this is "substantially less" than the \$41.7 million cost

^{5/} Appellants also argue that constructing a nanofiltration system will be necessary, in any event, in order to satisfy a water quality standard of 40 parts per billion (ppb) for total trihalomethane (TTHM), a known carcinogen, which has been proposed by the EPA. (SOR at 10.) They note that Ute Water currently provides water having 56 ppb of TTHM, and thus would not meet the proposed EPA standard. Id. Ute Water does not challenge Appellants' report of its current TTHM level, but notes that the EPA proposal is actually to lower the TTHM standard to 80 ppb, well above its current level. (Ute Water Answer at 15 (citing Affidavit of T.R. Crumpton, Superintendent of Supply and Treatment, Ute Water, dated Aug. 4, 1998 (Ex. D attached to Ute Water Answer) at 2).) This is, in fact, confirmed by copies of selected pages from an EPA Federal Register publication (Attachment 1 to Crumpton Affidavit). See 62 Fed. Reg. 59390, 59393, 59465 (Nov. 3, 1997).

^{6/} The 13 MGD system alternative requires that Ute Water obtain water not only from the river, but also from a new 24-inch-diameter Plateau Creek pipeline. (Final EIS at 7-8, B-124 to B-127.) Were Ute Water to obtain all of the water needed to meet current and future demand from the river, BLM stated that a 20 MGD system was necessary. Id. The capital cost of such a system was estimated to be nearly \$20 million. See Final EIS at B-127.

estimated by BLM for a Ute Water nanofiltration system and "far less" than the \$34.3 million cost of the proposed replacement pipeline. (SOR at 8.) They also assert that the nanofiltration system could be scaled back (from 13 to 7.5 MGD), thus reducing the start-up cost further. Id. at 9.

Appellants' analysis fails to recognize that BLM's \$41.7 million estimated cost for a new nanofiltration alternative actually represents costs associated with the pumping station which would be required in the event this alternative were utilized. (Draft EIS at D-8; Final EIS at 8, B-127, D-1 to D-2; Letter to CCRA from Area Manager, dated May 15, 1998, at 1-2.) It does not include the cost of the nanofiltration system itself. Thus, using appellants' cost estimate, the total cost of constructing a nanofiltration system and pumping the water from the Colorado River to the plant would actually be \$60.6 million, substantially in excess of Ute Water's \$35 million financial capability threshold and the expected \$34.3 million cost of the proposed action. (Ute Water Answer at 11-12.) Thus, the record establishes that the total cost renders the nanofiltration alternative economically infeasible. (Final EIS at B-129; Ute Water Answer at 12.)

Appellants fail to include, in their estimate of the cost of a new nanofiltration system, the cost of a new pump station to pump water from the river. In analyzing this alternative, BLM concluded that the existing pump station which is designed for emergency use, not continuous pumping, has a capacity of 10 MGD, which is insufficient to meet the projected future peak-day demand of 40 MGD. See Draft EIS at 1-13; PMP at 2-3; Letter to CCRA from Area Manager, dated May 15, 1998, at 2; Ute Water Answer at 8-10, 14, and Ex. D, Crumpton Affidavit at 1. Peak-day demand had already exceeded the 10 MGD capacity of the existing pump station each of 3 years from 1994 to 1996, and average-day demand was itself expected to top the 10 MGD mark sometime between the years 2005 and 2015. 7/ (Draft EIS at 1-3, 1-13.) In addition, the existing pump station would still be insufficient to meet the projected future peak-day demand of 40 MGD, even were the existing 24-inch-diameter pipeline to be replaced with the same diameter pipeline, thus providing an additional 10 MGD, or a combined capacity of 20 MGD. (Ute Water Answer at 9-10; Draft EIS at 1-3, 1-13.) Further, BLM projected that demand would exceed the 20 MGD capacity by the year 2035, in the case of average-day demand, and even earlier in the case of peak-day demand (between the years 2015 and 2025). (Draft EIS at 1-13.) Thus, the evidence supports the need for a new larger capacity pump station, in order to satisfy future demand.

The estimated cost of a new pump station, which would need to be constructed in a new location, was found by BLM to be \$11 million. See Letter to CCRA from Area Manager, dated May 15, 1998, at 2; Ute Water

7/ BLM reported that peak-day demand had "exceeded 12 mgd" each of the summers from 1994 through 1996 and Ute Water now informs us that peak-day demand had even reached 14.9 MGD on July 28, 1998. (Draft EIS at 1-3; Ute Water Answer at 14 (citing Crumpton Affidavit at 2).)

Answer at 10. Next, BLM noted that a 1.5-mile long discharge pipeline, to carry water from the new pump station to Ute Water's water treatment plant, would also be needed, at an estimated cost of \$6.8 million. See Letter to CCRA from Area Manager, dated May 15, 1998, at 2 ("about 2 miles"); Ute Water Answer at 8, 10-11; Crumpton Affidavit at 1. It also noted that a new electrical substation and related distribution system would have to be constructed, since the current substation and distribution system is not equipped to provide sufficient electrical power to a new pump station. (Letter to CCRA from Area Manager, dated May 15, 1998, at 2; Ute Water Answer at 10 (citing Letter to WestWater Engineering from Public Service Company of Colorado, dated Dec. 23, 1994 (Ex. E attached to Ute Water Answer))). It estimated this cost at \$3.5 million. See Ute Water Answer at 10 (citing Ex. E attached to Ute Water Answer).

Finally, BLM noted that the nanofiltration alternative would also entail additional costs for operating and maintaining the new pump station, electrical substation, and discharge pipeline over their useful life. The present value of these costs amortized over 50 years amounted to \$18.6 million. See Letter to CCRA from Area Manager, dated May 15, 1998, at 2; Ute Water Answer at 11 (citing Letter to WestWater Engineering from Public Service Company of Colorado, dated Dec. 23, 1994 (Ex. E attached to Ute Water Answer)). In addition, BLM estimated a 50-year amortized cost of \$1.8 million for the added costs of operating and maintaining the nonnanofiltration facilities in the existing water treatment plant. ^{8/} See Ute Water Answer at 11.

The issue before us on appeal is whether BLM has explored the reasonable alternatives to the proposed action which will accomplish the intended purpose, which are both technically and economically feasible, and which will have a lesser impact. The analysis of the nanofiltration alternative in the record establishes that this alternative was not economically feasible. Accordingly, we find appellants have not shown error in the range of alternatives analyzed by BLM in the EIS.

Appellants also contend that BLM failed, in its EIS, to adequately address the indirect impacts of the proposed action on prime and unique farmland, open space, and air and water quality in the Grand Valley from residential/commercial development, or "urban sprawl," which would likely be spawned by construction/operation of the replacement pipeline and the resulting "quadrupling of [Ute Water's] domestic water supply delivery"

^{8/} In addition to the costs of the new facilities required under the nanofiltration alternative, Ute Water would incur the cost of activating conditional water rights, in order to be able to extract additional water from the river, and of providing for the disposal of concentrated salts (brine) generated by the treatment of river water, all of which makes this alternative more economically infeasible. (Final EIS at 7-8, B-124 to B-127, B-129; Letter to CCRA from Area Manager, dated May 15, 1998, at 1; Ute Water Answer at 9, 12.) Appellants have provided no evidence to the contrary.

capability. 9/ (SOR at 16.) They state that the immediate consequence "could" be the loss of "up to 100 square miles" of farmland in the valley, noting that 40 percent of the County's farmland has already been "lost to urban sprawl" during the last 30 years, which coincides with Ute Water's existence. Id. at 15, 16. They also note that, in addition to the increased cost to taxpayers for roads and other infrastructure, there will be "environmental degradation, school overcrowding, increased crime, and other social malaise," all of which BLM failed to address in its water pipeline EIS. 10/ Id. at 18.

It is clear that BLM decided not to consider the potential environmental impacts of residential/commercial development in the Grand Valley at the time it prepared the EIS at issue here, because "[o]verall population growth and its related effects in the Grand Valley are examples of impacts that are not considered to be caused by the proposed action," and thus cannot be considered "indirect" effects thereof. (Final EIS at 11; see id. at B-130 to B-131, B-146.) We are not persuaded that BLM was required to do so.

9/ Appellants also assert, in this regard, that BLM failed to consider "cumulative" impacts. (SOR at 12.) Cumulative impacts are defined as the impacts of a proposed action in conjunction with "other past, present, and reasonably foreseeable future actions." 40 C.F.R. ' 1508.7. While development is a "reasonably foreseeable" future action, appellants have not shown that it will, together with construction and operation of the pipeline, have any cumulative impact on the environment which BLM failed to adequately consider, in violation of 40 C.F.R. ' 1508.25. See Southern Utah Wilderness Alliance, 127 IBLA 282, 285-90 (1993); Colorado Environmental Coalition, 108 IBLA 10, 16-18 (1989). It must be remembered that BLM is not, by virtue of the cumulative impact analysis mandate of 40 C.F.R. ' 1508.25, required to consider all of the impacts of development, but simply to assess the impacts of issuing the right-of-way grant "when added to" those of development. 40 C.F.R. ' 1508.7; see Landmark West! v. U.S. Postal Service, 840 F. Supp. 994, 1010-11 (S.D. N.Y. 1993), aff'd, 41 F.3d 1500 (2d Cir. 1994); Defenders of Wildlife, 152 IBLA at 8. In this respect, appellants have failed to show error.

10/ Appellants also argue that BLM failed to properly consider, in its EIS, the increased cost to Ute Water's existing customers who will have to pay the higher rates needed to fund the proposed replacement pipeline. (SOR at 17.) They assert that the statements in the EIS are "extremely vague and noncommittal." Id. Appellants have not shown this discussion which sets forth the range of potential increases in rates and/or tap fees, which have yet to be finally determined by Ute Water, is inadequate.

(Draft EIS at 3-21, 4-27 to 4-30; Final EIS at B-146 to B-147; Socioeconomic Technical Memorandum, dated Apr. 28, 1997, at 27-28; Ute Water Answer at 18-19; BLM Answer at 11.) In this regard, BLM notes that the most likely scenario is an equal allocation of the financial burden between rates and tap fees, which, at most, would translate into a \$2 to \$3 increase in the monthly rate (over the existing \$19/month) for an average home and a \$1,500/unit increase in the tap fee (over the existing \$3,200/unit) for a new single family home. (Draft EIS at 3-21, 4-28 to 4-29; Socioeconomic Technical Memorandum at 28.)

[2] Regulation 40 C.F.R. ' 1508.25 requires BLM to consider the "indirect" effects of its proposed action, which are defined as those

which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.

[They] may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

40 C.F.R. ' 1508.8(b) (emphasis added); see Sierra Club v. Marsh, 769 F.2d 868, 877-78 (1st Cir. 1985); Mullin v. Skinner, 756 F. Supp. 904, 920-23 (E.D. N.C. 1990). Further, indirect effects must be considered even where they would be the consequence of non-Federal action that would take place solely on private property. Sierra Club v. Hodel, 544 F.2d 1036, 1037-38, 1043-44 (9th Cir. 1976); City of Davis v. Coleman, 521 F.2d 661, 677 (9th Cir. 1975); James Shaw, 130 IBLA 105, 113-14 (1994). In order to conclude that a particular indirect effect is "cause[d]" by a proposed action, within the meaning of 40 C.F.R. ' 1508.8(b), it must be shown that there is a "reasonably close causal relationship" between the Federal action and the effects at issue, and where the "causal chain" is unduly lengthened, NEPA does not apply. Defenders of Wildlife, 152 IBLA at 7; James Shaw, 130 IBLA at 114, citing Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774-75 (1983).

It does not appear that growth and development in the Grand Valley or Mesa County will be "caused" by the proposed Plateau Creek pipeline, within the meaning of 40 C.F.R. ' 1508.8(b), since the record discloses that development will generally occur regardless of whether BLM approves the right-of-way and the pipeline is constructed. Thus, BLM analysis indicated that the predominant impact of the no action alternative which would result in a tap moratorium by about the year 2018 would be a "redistribution of future growth to other parts of Mesa County." (Draft EIS at 4-31.) Hence, BLM concluded that:

As documented in the [Draft] EIS, the No Action Alternative does not actually limit future population growth. Under the No Action Alternative, forecasts suggest that development patterns would be redirected to those areas in Mesa County, such as Plateau Valley, DeBeque, and Whitewater that may not have the requisite schools, transportation systems, or infrastructure to effectively manage these shifts in development patterns. The shift in development patterns is the cause of the unmitigable socioeconomic impacts associated with the No Action Alternative. Hence, the No Action Alternative would simply redirect growth patterns, but would not stop overall in-migration and population growth in the study area.

(Final EIS at 12.)

Appellants have not shown that the development they foresee will not occur unless BLM grants the right-of-way and the pipeline is built,

and thus fail to demonstrate the necessary causal link. Appellants seek to establish a link based on BLM's recognition that the no action alternative may result in shifting patterns of population growth to other areas of Mesa County. However, while the absence of a suitable water supply provided by Ute Water may limit future development in a particular area, we find no evidence to support the conclusion that the presence of such a supply will necessarily cause development to occur in a given area. There is simply no evidence that Ute Water's enhanced water delivery ability, by virtue of construction of a new 48-inch-diameter pipeline under the proposed action alternative, will be the deciding factor in promoting development, any more so than the multitude of other factors necessary for development, including the rest of the infrastructure (electrical and other utilities, roads/highways, fire/police and other community services, etc.), favorable zoning regulation, and "quality of life factors." (Ute Water Answer at 18; see SOR at 14.)

We also note that there are potential sources of water other than Ute Water, including existing irrigation ditches. (Draft EIS at 3-6, 4-31, D-8; Ground Water Resources Technical Memorandum, dated May 5, 1997, at 6-7.)

Thus, development may occur in a particular area, even if Ute Water will not provide the necessary water. (Socioeconomic Technical Memorandum at 30-31; Ute Water Answer at 18 (citing Affidavit of Larry Clever, General Manager, Ute Water, dated Aug. 4, 1998 (Ex. F attached to Ute Water Answer at 1).))

The facts that construction/operation of the Plateau Creek pipeline at issue here has not been shown to stimulate, induce, or otherwise cause population growth in the Grand Valley, within the meaning of 40 C.F.R. ' 1508.8(b), and that the two are not connected in the sense that growth cannot or will not proceed without construction/operation of the pipeline, within the meaning of 40 C.F.R. ' 1508.25(a)(1), distinguish this case from other cases in which a close link between the proposed action and the resulting effects has been established and, hence, analysis of indirect effects has been required. See Sierra Club v. Marsh, 769 F.2d at 872, 878-79 (building causeway and road to undeveloped island and erecting related port facilities will likely stimulate industrial development on island); Port of Astoria, Oregon v. Hodel, 595 F.2d 467, 473, 477 (9th Cir. 1979) (contract to supply electricity, by means of new transmission line, to allow construction of aluminum processing plant dependent on the power source); Sierra Club v. Hodel, *supra* (similar); City of Davis v. Coleman, 521 F.2d at 674-77 (building highway interchange is an "essential catalyst" of planned nearby industrial development); Mullin v. Skinner, *supra* (building improved bridge to island will likely spur residential and commercial development on island).

We, therefore, conclude that BLM did not, by failing to consider the environmental impacts of residential/commercial development in the Grand Valley in its EIS, improperly limit the scope of its environmental analysis, in violation of 40 C.F.R. ' 1508.25. BLM was not required by 40 C.F.R. ' 1508.25 to consider such impacts as the "indirect" effects of construction/operation of the pipeline. James Shaw, 130 IBLA at 114-15.

Appellants also contend that BLM, in its EIS, failed to consider providing protection for the habitat of the southwestern willow flycatcher along Plateau Creek. (SOR at 19.) With respect to impact on the southwestern willow flycatcher, both BLM, in its Biological Assessment, and FWS, in its BO (which was incorporated into the Final EIS), considered the impact of constructing and operating a replacement pipeline on the bird and its habitat. See Biological Assessment at 2-4 to 2-7, 3-1, 4-5 to 4-7, 5-4; Draft EIS at 3-15, 4-21 to 4-22; Final EIS at 16; Final EIS, Appendix C at 1. FWS agreed with BLM that such activity might affect, but was not likely to adversely affect this species, thus not requiring it to make a jeopardy determination pursuant to section 7(a)(2) of the ESA, as amended, 16 U.S.C. ' 1536(a)(2) (1994), especially given the BLM mitigation requirement that construction activities avoid occupied habitat during critical times of the year. (ROD at 1 (adopting Final EIS at 16); Final EIS at 12-13, 16; Final EIS, Appendix C at 1; Biological Assessment at 5-4, 6-1.) Appellants have provided no evidence to contradict BLM.

Appellants also contend that BLM failed, in its EIS, to adequately consider preventing the de-watering of "non-jurisdictional wetlands," currently sustained by agricultural irrigation, which might occur were 1,000 acre-feet of water to be converted by Ute Water from agricultural to municipal use, in order to support its projected year 2045 peak-day demand. (SOR at 19-20.) The record discloses that BLM briefly considered this impact, concluding that no action was required because any adverse impact was remote and highly speculative and perhaps nonexistent. (Draft EIS at 4-19 to 4-20; Final EIS at B-149 to B-150; Letter to EPA from Area Manager, Grand Junction Resource Area, Colorado, BLM, dated May 15, 1998, at 2; BLM Answer at 13.) Appellants have provided no evidence to dispute BLM's assessment.

To the extent that they have not been expressly or impliedly addressed in this decision, all other grounds of error asserted by appellant are rejected on the ground that they are not supported by the record or the law.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the motion to dismiss the appeal for failure to timely file the SOR is denied, and the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge